INDEX

CITATIONS

675972—62——1

Cases—Continued

Cases—Continued

Miscellaneous—Continued

Page

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 392

AGNES K. HEAD, d/b/a LEA COUNTY PUBLISHING CO., AND PERMIAN BASIN RADIO CORPORATION, APPELLANTS

v.

NEW MEXICO BOARD OF EXAMINERS IN OPTOMETRY

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW MEXICO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to this Court's order of November 13, 1962, inviting the Solicitor General to express the views of the Federal Communications Commission on the issue of possible federal preemption by the Federal Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151, *et seq.* For reasons elaborated below, it is our view that the Communications Act precludes the issuance of an injunction by the New Mexico courts prohibiting broadcasting of certain advertising by appellant radio station.

We shall address ourselves solely to the issue of preemption, as requested by the Court's order, and shall not undertake to discuss the constitutional questions raised by the appellants under the commerce clause and the Fourteenth Amendment.[1] The issue with which we deal relates to appellant Permian Basin Radio Corporation, which operates a radio station, but does not affect the other appellant, Lea County Publishing Co., which publishes a newspaper.

STATEMENT

Permian Basin Radio Corporation (Permian) is the owner of KHOB, a standard broadcast (AM) radio station in Hobbs, New Mexico. Permian operates station KHOB under a license issued by the Federal Communications Commission pursuant to the Federal Communications Act of 1934. This license was renewed for a three-year term in September 1959 and again in September 1962. KHOB's service area comprises portions of southeast New Mexico and west central Texas (R. 39). It regularly provides news coverage of Texas communities and broadcasts advertising for firms located in Texas (R. 27). At issue here is the broadcasting of advertisements for

[1] We note, however, that the question of preemption by the Communications Act is related to the issue whether the state injunction constituted an unconstitutional burden on interstate commerce. The basic contention made by appellants under the commerce clause—the incompatibility of broadcasting with a diversity of state regulations and the consequent necessity of a unified system of federal regulation—supports our conclusion that the Act has preempted the area in question.

a Dr. Roberts, an optometrist in Gaines County, Texas, which quoted prices for the prescription and sale of eyeglasses at his place of business in Texas.

The appellee Board administers the New Mexico statutes pertaining to the practice of optometry, including a provision prohibiting the advertisement either of prices or of discounts for eyeglasses, spectacles, lenses, frames, and mountings. New Mexico Stat. Ann. § 67-7-13. In its complaint in the state district court (R. 1-3), the Board alleged that Roberts placed advertising violating this law with the appellant Permian, as well as with appellant Lea County Publishing Co., the publisher of a New Mexico newspaper, and with KWEW, a second New Mexico radio station. Alleging the absence of any plain, speedy, or adequate remedy at law, the Board sought an injunction prohibiting Roberts from advertising, and the other parties from accepting and publishing such advertising, in New Mexico.

The district court of Lea County, New Mexico, entered the injunctions sought by the Board against Roberts (R. 9-10, 12), and against the radio stations and the newspaper publisher (R. 20-21). On appeal by the New Mexico newspaper and radio stations, the Supreme Court of New Mexico affirmed (R. 43-52). Appellant Permian was enjoined from accepting or publishing within the State of New Mexico advertising of any nature from Roberts which quoted prices or terms on eyeglasses, or which quoted discounts or stated moderate prices, low prices, or words

of similar import prohibited by state law (R. 20–21). The court rejected contentions that the state law had been preempted by federal legislation, ruling that the Federal Communications Act and the Federal Trade Commission Act deal with false advertising but do "not attempt to regulate truthful advertising by radio in interstate commerce" (R. 48–49). It further held that state regulation did not impose an unconstitutional burden on interstate commerce (R. 50–51) and did not deprive the parties of liberty or property in violation of the Fourteenth Amendment or the state constitution (R. 51–52).

ARGUMENT

THE FEDERAL COMMUNICATIONS ACT BARRED THE NEW MEXICO COURTS FROM ISSUING AN INJUNCTION AGAINST THE BROADCASTING OF MATERIAL DEEMED CONTRARY TO THE PUBLIC INTEREST UNDER STATE LAW

INTRODUCTION AND SUMMARY

The New Mexico courts have enjoined the appellant radio station from broadcasting advertising within New Mexico concerning the prices or terms at which eyeglasses may be procured from a Texas optometrist. The sole question to which we address ourselves is whether the Federal Communications Act bars this injunction. We urge that such a prohibition upon the material to be broadcast, based on a state statute which in effect determines that such broadcasting violates the public interest, is preempted by the federal regulatory Act under well settled principles laid down by this Court.

This Court has held in numerous cases that enactment of a comprehensive and pervasive federal scheme of regulation bespeaks a congressional purpose to occupy the field and exclude state law. The Court has found federal preemption in recent years on this basis in *Campbell* v. *Hussey*, 368 U.S. 297 (tobacco standards), *San Diego Unions* v. *Garmon*, 359 U.S. 236 (labor relations), *Pennsylvania* v. *Nelson*, 350 U.S. 497 (sedition), *Hood & Sons* v. *Du Mond*, 336 U.S. 525 (milk), and *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (grain warehouses). State regulation is also barred when the federal interest is so dominant that the federal statute will be assumed to preclude the enforcement of state law on the same subject. *Pennsylvania* v. *Nelson*, *supra*, 350 U.S. at 504–510; *Hines* v. *Davidowitz*, 312 U.S. 52, 66, 73–74.

Where the federal act is construed to preempt a regulatory field, state law is barred whether supplementary or conflicting. *Campbell* v. *Hussey*, *supra*, 368 U.S. at 302; *Hood & Sons* v. *Du Mond*, *supra*, 336 U.S. at 542–543. As Mr. Justice Brandeis stated in *Napier* v. *Atlantic Coast Line R. Co.*, 272 U.S. 605, 613, where preemption was inferred from the "broad scope of the authority conferred upon" the Interstate Commerce Commission, further "requirements by the States are precluded however commendable or however different their purpose." Similarly in *Rice* v. *Santa Fe Elevator Corp.*, *supra*, federal regulatory control of warehousemen was effectuated primarily through standards governing issuance, suspension, or revocation of licenses, while state law

prescribed direct regulation of rates and other practices. The Court stated that the federal scheme "prevails though it is a more modest, less pervasive regulatory plan than that of the State." *Id.* at 236.[9]

Applying these principles, we submit that the Federal Communications Act precludes a state injunction—which is in effect based on the State's view of the public interest—prohibiting the broadcast of particular messages. The Act, we believe, has precluded direct regulation by the States of programs and advertisements broadcast by radio stations as shown by (1) the federal provisions for regulation of the content of radio broadcasting in the public interest, and (2) the dominant federal interest in the area. While the Act has no provisions relating to the precise subject of the state regulation, advertising by optometrists or other professional men, the States cannot supplement a federal statute which provides as full regulation as Congress deemed appropriate.

We are not suggesting that Congress, through the Federal Communications Act, has precluded all state action affecting radio broadcasting. It does not appear that Congress intended to bar the States from applying traditional common law remedies to recompense individuals injured by radio broadcasting. For example, we do not believe that Congress, which failed

[9] For a more complete discussion of the standards to be applied in determining whether federal legislation has barred state regulation, we refer the Court to the government's brief as *amicus curiae* in *Colorado Anti-Discrimination Commission* v. *Continental Air Lines, Inc.*, Nos. 146 and 492, this Term, pp. 33–36, 40–50.

to enact any provision relating to defamation, intended generally to preclude individuals injured by false statements made in a radio broadcast from suing for damages. In addition, we believe that a State may hold an individual accountable under its general criminal laws relating to fraud, albeit the fraud is committed through use of interstate channels of radio communication.

A distinction must be drawn between traditional crimes and torts which are accomplished by means of broadcasting—a matter still largely within state control because of the intentional failure of Congress to enact a supervening code—and so-called public welfare or regulatory statutes which would establish widely divergent standards as to what types of broadcasting are in the public interest. As to the latter area, Congress' purpose was to eliminate confusion and interference with the interstate medium by creating a single source of regulatory authority.[3]

A. THE FEDERAL COMMUNICATIONS ACT EXCLUSIVELY REGULATES THE CONTENT OF RADIO BROADCASTING, INCLUDING BOTH PROGRAMMING AND ADVERTISING.

1. The Act provides for comprehensive regulation of the content of radio broadcasting.

a. The Commission's general powers under the Act.—Congress initiated the regulation of radio broad-

[3] The Commission's authority to regulate the use of radio is not exclusive as against other federal agencies. The Commission is, of course, required to exercise its authority with suitable accommodation to provisions of other federal statutes such as the Federal Trade Commission Act, which gives the Federal Trade Commission authority relating to false radio advertising. See 15 U.S.C. 52, 53.

casting by the Radio Act of 1912, which forbade radio broadcasting without a license from the Secretary of Commerce and Labor, allocated frequencies for use of the government, and imposed certain technical restrictions such as the character of wave emissions. 37 Stat. 302. When the number of stations began to multiply, thus interfering with each other's transmissions, the Secretary attempted to regulate this area. The Court of Appeals for the District of Columbia held, however, that, under the Radio Act, the Secretary could not deny a license to a qualified applicant on the ground that the proposed station would interfere with an existing station. *Hoover* v. *Intercity Radio Co.*, 286 Fed. 1003. The Acting Attorney General ruled in 1926 that the Secretary had no power to regulate the power, frequency, or hours of operation of stations. 35 Ops. Atty. Gen. 126. Stripped of all effective power, the Secretary abandoned his efforts to regulate radio and urged self-regulation. When the situation grew worse, Congress passed the Radio Act of 1927, which created the Federal Radio Commission and endowed it "with wide licensing and regulatory powers." *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 213. The essential provisions of that statute were reenacted in the Federal Communications Act of 1934 which, as amended, 47 U.S.C. 151, *et seq.*, is the basic federal statute involved in this case.[1]

[1] The history of federal regulation of broadcasting is described in more detail in the *National Broadcasting Co.* case, 319 U.S. at 210–213.

The Communications Act asserts broad federal authority over all uses of the interstate channels of radio communication. Section 301, 47 U.S.C. 301, declares that it is "the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmissions; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority * * *." The provisions of the Act "apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio; * * * and to the licensing and regulating of all radio stations as hereinafter provided * * *." Section 2(a), 47 U.S.C. 152(a). No person may use any apparatus for the interstate transmission of radio signals except with a license granted under the provisions of the Communications Act. Section 301, 47 U.S.C. 301.

The Act created a special federal agency to effectuate federal regulation. The Federal Communications Commission, the successor to the Federal Radio Commission, was established to regulate "interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of national defense, for the

purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication * * *." Section 1, 47 U.S.C. 151. The Commission's regulatory authority centers around its licensing functions. The Commission may issue or renew a radio station license only if the public interest, convenience, or necessity will be served thereby (Sections 307(a), 307(d), 308(a), and 309(a) of the Communications Act, 47 U.S.C. 307(a), 307(d), 308(a), and 309(a)), and may revoke a license "because of conditions coming to [its] attention * * * which would warrant it in refusing to grant a license or permit on an original application" (Section 312(a)(2), 47 U.S.C. 312(a)(2)). It has authority both to issue cease and desist orders against actions in violation of the Act or its own regulations, or failure to operate in accordance with a license (Section 312(b), 47 U.S.C. 312(b)), and to impose monetary forfeitures on broadcast licensees for wilful violations of the Act, regulations, or Commission orders and for wilful failure to operate according to the license (47 U.S.C. 503). No license may be transferred without the Commission's approval. Section 310(b), 47 U.S.C. 310(b). The Commission also has power to conduct investigations. Section 403, 47 U.S.C. 403.

In addition, Section 303 of the Communications Act, 47 U.S.C. 303, grants to the Commission broad authority to regulate the use of radio as the "public convenience, interest, or necessity requires." On the basis of this criterion, the Commission is empowered, *inter alia*, to: "Classify radio stations"; "[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class"; "[s]tudy new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest"; and "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party." Sections 303(a), (b), (g), and (r), 47 U.S.C. 303(a), (b) (g), and (r). See also Section 4(i), 47 U.S.C. 154(i).

It is beyond dispute that Congress intended to set up a broad scheme of national regulation of radio broadcasting. As we have noted, this Court has characterized the predecessor of the present Act, the Radio Act of 1927, as giving the Commission "wide licensing and regulatory powers." *National Broad-*

67972—60—8

casting Co. v. *United States*, 319 U.S. 190, 213. Accord, *Federal Radio Commission* v. *Nelson Brothers Co.*, 289 U.S. 266, 279, 282, 285; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137. The Court has likewise made clear that the Federal Communications Act of 1934 gives the Commission "comprehensive power to promote and realize the vast potentialities of radio." *National Broadcasting Co.* v. *United States*, *supra*, 319 U.S. at 217; accord, *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 203, *Allen B. Dumont Laboratories* v. *Carroll*, 184 F. 2d 153 (C.A. 3), certiorari denied, 340 U.S. 929. The public interest standard gives the Commission extremely broad authority since it means no less than "the interest of the listening public in 'the larger and more effective use of radio.' §303(g)." *National Broadcasting Co.* v. *United States*, *supra*, 319 U.S. at 216.

b. The Commission's specific powers with regard to the content of programming and advertising.—We have seen that the Commission has broad general powers. Since, however, we do not contend that the Act has precluded all state action affecting radio broadcasting, these general powers merely provide background to the issue in this case—the extent of the Commission's powers over broadcasting content. We will now show that the Commission has been given extensive authority to regulate programs and advertising material in the public interest.

Under Section 326 of the Act, 47 U.S.C. 326, the Commission has no "power of censorship over the

radio communications or signals transmitted by any radio station," and it may not promulgate or fix any regulation or condition "which shall interfere with the right of free speech by means of radio communications." However, Section 303(j), 47 U.S.C. 303(j), provides that the Commission may "make general rules and regulations requiring stations to keep such records of programs * * * as it may deem desirable." In determining whether the issuance, renewal, or revocation of a license will serve the public interest under Sections 307 (a), (d), 308(a), 309(a), and 312 of the Act, 47 U.S.C. 307 (a), (d), 308(a), 309(a), and 312, the Commission has authority to consider proposed and past programming, as well as programming policies.[5] Thus, in *Federal Radio Commission* v. *Nelson Brothers Co., supra,* 289 U.S. at 285, the Court stated that, in granting licenses, the public interest standard required consideration of "the scope, character and quality of services" to be rendered. Similarly, in *National Broadcasting Co.* v. *United States, supra,* 319 U.S. at 215–216, in upholding the chain broadcasting regulations relating to the grant of licenses, the Court declared: "The Act itself establishes that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication. * * * It puts upon the Commission the burden of determining the composition of that traffic." Accord, *Regents* v. *Carroll,*

[5] The uttering of "any obscene, indecent, or profane language" by radio, and the transmission of knowingly false or deceptive communications are federal offenses. 18 U.S.C. 1343, 1464; 47 U.S.C. 509.

338 U.S. 586, 598; *KFKB Broadcasting Ass'n* v. *Federal Radio Commission*, 47 F. 2d 670, 672 (C.A. D.C.); *Trinity Methodist Church, South* v. *Federal Radio Commission*, 62 F. 2d 850 (C.A. D.C.), certiorari denied, 284 U.S. 685, 288 U.S. 599; *Simmons* v. *Federal Communications Commission*, 169 F. 2d 670, 671–672 (C.A. D.C.), certiorari denied, 335 U.S. 846.[6] The courts have reasoned that the denial of a license upon a ground reasonably related to the public interest is neither censorship nor an abridgement of the right of free speech (*National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226),[7] and that "comparative service to the listening public is the vital element; and programs are the essence of that service". (*Johnston Broadcasting Co.* v. *Federal Communications Commission*, 175 F. 2d 351, 359 (C.A. D.C.); see *Simmons* v. *Federal Communications Commission*, 169 F. 2d 670 (C.A. D.C.), certiorari denied, 335 U.S. 846;

[6] See also *Great Lakes Broadcasting Co.* v. *Federal Communications Commission*, 289 F. 2d 754, 755 (C.A. D.C.); *Henry* v. *Federal Communications Commission*, 302 F. 2d 191 (C.A. D.C.), certiorari denied, 371 U.S. 821; *Noe* v. *Federal Communications Commission*, 260 F. 2d 739, 743 (C.A. D.C.), certiorari denied, 359 U.S. 924; 75 Cong. Rec. 3682.

[7] Since advertising, although not wholly beyond the First Amendment, enjoys less protection than other speech (see *Murdock* v. *Pennsylvania*, 319 U.S. 105, 110–111; *Valentine* v. *Chrestensen*, 316 U.S. 52, 54; *Martin* v. *Struthers*, 319 U.S. 141, 142, note 1; *Breard* v. *Alexandria*, 341 U.S. 622, 641–643), the Commission's power to regulate advertising by radio may, indeed, be broader than it is with respect to other programming. Cf. *Farmers Union* v. *WDAY*, 360 U.S. 525, 529–530 (political broadcasts); *Henry* v. *Federal Communications Commission*, 302 F. 2d 191, 194 (C.A. D.C.), certiorari denied, 371 U.S. 821 (entertainment).

Bay State Beacon, Inc. v. *Federal Communications Commission*, 171 F. 2d 826, 827 (C.A. D.C.)).

If programming is a proper consideration "in individual cases, there is no reason why it may not be stated in advance by the Commission in interpretative regulations defining the prohibited conduct with greater clarity." *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U.S. 284, 289–290, note 7. Cf. *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 203. Such regulations would require accommodation of the Commission's authority and of the statutory and constitutional guarantees of free speech. The Commission has not in fact issued general regulations on the subject. Consequently, the precise limits of the Commission's authority, as it may be exercised through rule making or by action on individual license applications, are not definitively established.

There is, however, no question that the Commission has asserted considerable authority to regulate programming, including advertising, in the public interest. For example, in *WREC Broadcasting Service*, 10 Pike & Fischer, Radio Regulation 1323, 1358 (1955), the Commission sustained an examiner's conclusion that an applicant in a comparative proceeding, who accepted so-called "bait and switch" advertising, "avoided its proper responsibility as a broadcaster in failing to exercise more care in accepting advertising." It stated (*id.* at 1358–1359):

> We agree with the Examiner's conclusion. A broadcasting station is not without responsibility with respect to the advertising it carries.

> It may not, in the proper discharge of its licensee responsibility adopt a general attitude of "accepting in good faith all advertising offered," particularly when, as here, advertising has been called specifically to its attention.

See also, *e.g.*, Public Notice issued on February 21, 1957, on deceptive or misleading advertising (14 Pike & Fischer, Radio Regulation 1262); Public Notice issued on March 9, 1962, on double billing practices (23 Pike & Fischer, Radio Regulation 175); *Knickerbocker Broadcasting Co., Inc.*, 2 F.C.C. 76, 77 (advertising of birth control products deemed to be "offensive and contrary to the public interest").

More particularly, with direct relevance to the issues in this case, the Commission has repeatedly directed itself to advertising which bears upon public health and safety. Thus, the Federal Radio Commission denied a renewal of a license to a station which broadcast a "medical question box" devoted to diagnosing and prescribing treatment of illnesses from symptoms given in letters from listeners, and which received a rebate on each prescription sold. *KFKB Broadcasting Ass'n* v. *Federal Radio Commission*, 47 F. 2d 670, 671 (C.A. D.C.). The Radio Commission held, with judicial approval, that "the practice of a physician's prescribing treatment for a patient whom he has never seen, and bases his diagnosis upon what symptoms may be recited by the patient in a letter addressed to him, is inimical to the public health and safety, and for that reason is not in the public interest." *Id.* at 671–672. The Communications Commission has similarly condemned advertising of alleged

medical prescriptions and quack remedies, which were deemed inimical to health, and granted renewal only upon assurances that such broadcasting would be discontinued. *Farmers and Bankers Life Insurance Co.*, 2 F.C.C. 455, 457–459. The Commission stated that "[a] broadcast station carrying such programs should be held to a high degree of responsibility, affecting as they may the health and welfare of the listeners, and careful investigation of such products, and of the claims made therefor, should be made before they are advertised over a broadcast station." 2 F.C.C. at 458. See also *WSBC, Inc.*, 2 F.C.C. 293, 294–296, and *Oak Leaves Broadcasting Station, Inc.*, 2 F.C.C. 298 (both involving advertising of quack medicines by one not licensed to practice medicine).[5]

The Commission has likewise determined that a broadcaster's duty to ascertain and meet local programming needs may include an obligation, in accepting advertising, to respect local laws relating to health, safety, and morals. By a letter dated August 15, 1949, to the Chairman of the Senate Committee on Interstate and Foreign Commerce, the Commission stated its position on broadcasting advertisements for alcoholic beverages contrary to local law (5 Pike & Fischer, Radio Regulation 593, 594):

> In those localities and states where the sale of alcoholic beverages is prohibited by local or

[5] See also Opinions of the General Counsel, Federal Radio Commission, August 1, 1928–August 1, 1929, Opinion No. 32, pp. 77–82, and Hearings before Senate Committee on Interstate Commerce, 71st Cong., 1st and 2d Sess. on S. 6, pp. 87–89 (both involving advertising of cigarettes).

> state statutes, such advertising by radio in those areas would, of course, not be in the public interest, since adherence to the laws of the state in which a station is located, especially laws expressive of the public policy of the state or locality on subjects relative to health, safety, and morals, is an important aspect of operation in the public interest. Obviously, the same is true with respect to those areas where advertising of alcoholic beverages is prohibited by law.

This policy is consistent with the statement of this Court that the public interest "standard for the issuance of licenses would seem to imply a requirement that the applicant be law-abiding." *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U.S. 284, 289–290, note 7.

The Commission has recently reviewed the question of programming in a Policy Statement issued on July 29, 1960. *Report and Statement of Policy Re: Commission En Banc Programming Inquiry* [hereafter referred to as "Programming Policy Statement"] (20 Pike & Fischer, Radio Regulation 1901). Recognizing that its licensing and general regulatory functions are limited by the First Amendment and by Section 326 of the Communications Act, the Commission stated that it could "not condition the grant, denial or revocation of a broadcast license upon its own subjective determination of what is or is not a good program." *Id.* at 1906–1907. However it pointed to the "fact that a broadcaster is required to program his station in the public interest" and as-

serted authority to review the exercise of this responsibility. *Id.* at 1909. Consequently, the Commission generally defined the programming duties of the licensee (*Id.* at 1912):

> The confines of the licensee's duty are set by the general standard "the public interest, convenience or necessity." The initial and principal execution of that standard, in terms of the area he is licensed to serve, is the obligation of the licensee. The principal ingredient of such obligation consists of a diligent, positive and continuing effort by the licensee to discover and fulfill the fastes, needs and desires of his service area. If he has accomplished this, he has met his public responsibility. It is the duty of the Commission, in the first instance, to select persons as licensees who meet the qualifications laid down in the Act, and on a continuing basis to review the operations of such licensees from time to time to provide reasonable assurance to the public that the broadcast service it receives is such as its direct and justifiable interest requires.

The Commission also made clear that the licensee's duty to program in the public interest extends to advertising material. It stated (Programming Policy Statement, 20 Pike & Fischer, Radio Regulation 1912–1913):

> Broadcasting licensees must assume responsibility for all material which is broadcast through their facilities. This includes all programs and advertising material which they present to the public. With respect to adver-

tising material the licensee has the additional responsibility to take all reasonable measures to eliminate any false, misleading, or deceptive matter and to avoid abuses with respect to the total amount of time devoted to advertising continuity as well as the frequency with which regular programs are interrupted for advertising messages. This duty is personal to the licensee and may not be delegated. He is obligated to bring his positive responsibility affirmatively to bear upon all who have a hand in providing broadcast matter for transmission through his facilities so as to assure the discharge of his duty to provide acceptable program schedule consonant with operating in the public interest in his community. The broadcaster is obligated to make a positive, diligent and continuing effort, in good faith, to determine the tastes, needs and desires of the public in his community and to provide programming to meet those needs and interests. This again, is a duty personal to the licensee and may not be avoided by delegation of the responsibility to others.[9]

The Commission's concept of its responsibilities in the field of radio advertising accords with the views

[9] Recognizing that the "particular manner in which applicants are required to depict their proposed or past broadcast policies and services (including the broadcasting of commercial announcements) may therefore, have significant bearing upon the Commission's ability to discharge its statutory duties in the matter," the Commission had previously initiated proceedings (Docket No. 12673) on November 24, 1958, to make revisions to its rules prescribing the form and content of reports on broadcast programming. 23 Fed. Reg. 9298. Programming Policy Statement, 20 Pike & Fisher, Radio Regulation 1916.

expressed by Attorney General Rogers in a report submitted to the President on December 30, 1959. The Attorney General stated (Report by the Attorney General on Deceptive Practices in Broadcasting Media, 19 Pike & Fischer, Radio Regulation 1901, 1920):

> * * * a review of existing authority indicates that the Commission may, without running afoul of constitutional or statutory safeguards of freedom of speech, give considerable weight to advertising practices and programming in the context of licensing, rule making or investigative proceedings. It is true that the statutory provision relating to censorship and the First Amendment delineate the outer limits of the Commission's powers. Yet, within those limits considerable scope is left for effective regulatory action. This would certainly be so with respect to deceptive practices as opposed to problems of taste.[10]

[10] In the 1960 amendments to the Communications Act, 74 Stat. 889, Congress enlarged the Commission's powers to deal with certain deceptive practices in contests of intellectual knowledge or skill, by adding Sections 503(b) and 509, 47 U.S.C. (Supp. II) 503(b) and 509. These amendments were occasioned by the fact that the then-existing regulatory authority of the Commission "over deceptive broadcast practices does not extend beyond its broadcast licensees and the Commission cannot reach networks directly or advertisers, producers, sponsors, and others who in one capacity or another are associated with the presentation of a radio or television program which may deceive the listening or viewing public." S. Rep. No. 1857, 86th Cong., 2d Sess., p. 6; H. Rep. No. 1800, 86th Cong., 2d Sess., pp. 25–26. That Congress has legislated specifically concerning this aspect of programming does not mean that specific authorization is required for the Commission's consid-

In summary, the Federal Communications Act gives the Commission broad powers over radio broadcasting generally. More particularly, the Act gives the Commission authority to regulate programming, including advertising, to the extent compatible with "this country's tradition of free expression," in order to determine whether it is consistent with the public interest. *Farmers Union* v. *WDAY*, 360 U.S. 525, 529–530. The determination of what programming, including advertising, serves the public interest is clearly not a "merely peripheral concern" (see *San Diego Unions* v. *Garmon*, 359 U.S. 236, 243) of the Communications Act, so that it might be said that no preemption was intended. Construing the federal regulatory scheme, the Third Circuit has held that the Communications Act preempted the regulation of programming and barred state censorship of the broadcasting of motion pictures over television (*Allen B. Dumont Laboratories* v. *Carroll*, 184 F. 2d 153, 156, certiorari denied, 340 U.S. 929):

> The Act itself demonstrates that Congress was vitally concerned with the nature of the programs broadcast as affecting the public good. It, therefore, dealt directly with the subject matter of the broadcasts which Pennsylvania seeks to regulate here. * * * Program control was entrusted to the Federal Commission and it is an effective one. * * * We think it is clear that Congress has occupied fully the field of television regulation and that that field is no longer open to the States.

---

eration of programming in the exercise of its general licensing and regulatory authority over broadcast licensees. Cf. *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 219; *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 203.

Similarly, we submit, the authority conferred on the Commission with regard to radio advertising precludes the States from regulating advertising pursuant to their inevitably divergent views of the public interest.

2. The Act's regulation of the content of radio broadcasting reflects the dominant federal interest in this subject

We have noted above (pp. 7–8) that the Radio Act of 1927 was passed because of the chaos resulting from the unregulated use of radio. As this Court described the situation (*National Broadcasting Co.* v. *United States*, 319 U.S. 190, 212):

> [N]ew stations used any frequencies they desired, regardless of the interference thereby caused to others. Existing stations changed to other frequencies and increased their power and hours of operation at will. The result was confusion and chaos. With everybody on the air, nobody could be heard.

The solution to this problem was necessarily federal, rather than state, regulation. The allocation of channels and limitations on their use could not be controlled by the States. Radio transmission crosses state lines and, if each State could have provided its own variety of regulation, the consequence of 48 different regulatory schemes would almost certainly have been continuation of much of the existing chaos. See *Federal Radio Commission* v. *Nelson Brothers Co.*, 289 U.S. 266, 279. Thus, the federal interest in the technical regulation of radio broadcasting was plainly dominant.

We submit that the dominant federal interest in uniform regulation of the content of radio broadcasting is equally apparent. From the outset, control and regulation of the content of broadcasting, as well as its technical aspects, have been within the province of the federal government. See *National Broadcasting Co.* v. *United States, supra,* 319 U.S. at 210–216; see also *supra,* pp. 12–23. While the immediate problem which gave rise to the Radio Act was the physical one of interference, the allocation of a limited number of radio channels necessarily led to the question of content. As this Court stated in the *National Broadcasting Co.* case (319 U.S. at 216):

> * * * [The Act] puts upon the Commission the burden of determining the composition of [radio] traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply.

Uniform national regulation of the content of radio broadcasting is as necessary as uniform regulation of radio transmission itself. Unlike the dissemination of printed matter, radio broadcasting cannot be altered or limited when crossing state lines. Local restraints on the matter broadcast will necessarily affect the use of radio frequencies both within and without the regulating State because radio stations normally serve interstate audiences.[11] If each State within range of a broadcast signal sought to assert jurisdic-

[11] Since even intrastate use of radio affects interstate and foreign radio communication, it is also subject to federal regulation. Section 301 of the Act, 47 U.S.C. 301.

tion, the station could be subjected to a jumble of directives. For example, in this case, Permian's service area encompasses portions of New Mexico and Texas, and Texas does not impose restrictions on advertising by optometrists. The station could seek to comply with the more severe state law (here, New Mexico), but that means that New Mexico law is then limiting the service to Texas residents by a station licensed by the Communications Commission to serve both New Mexico and Texas. Moreover, in the event of conflict between New Mexico and Texas statutes, even the solution of following the more restrictive regulation might be impossible. If state authority could be limited to those States in which the station "does business" in traditional terms, *i.e.*, where it has a place of business, transmitter, or other facilities, the conflicts might be somewhat minimized. But this approach is wholly unacceptable for it would make the power to control the content of programming and advertising depend upon purely fortuitous factors (*e.g.*, the locations of transmitters), rather than upon a recognition of the real interests involved.

Even more striking is the situation which exists when an advertiser broadcasts over a network, rather than over a single station. If the injunction below were upheld, no radio station could carry an advertisement contrary to the policy of the State where the station happened to be located. The same would hold true of program content. If nationwide broadcasting were to become subject to regulation of this kind in fifty States, the mischief and confusion would

be incalculable. At the least, it may be said that multi-state broadcasting would be seriously inhibited.

The possibility of conflict between States is particularly acute because of the large number of state statutes regulating advertising. As an example, New Mexico has, in addition to the statute involved here, laws prohibiting any person to advertise (1) any article by stating that the sales tax is not included in the price advertised; (2) second-hand watches, without stating this fact; and (3) any article as to which there is a limitation on the number of items to be sold at the advertised price. N.M. Stat. Ann. §§ 72–16–7, 40–21–30, 49–1–5. Texas, on the other hand, has none of these provisions, but has other statutes prohibiting certain kinds of advertising. If one looks at the matter on a nationwide basis—as one would be obliged to do in the case of a network program—there is a veritable maze of provisions with which to reckon. If they apply to radio advertising, the result will clearly be serious interference with the uniform regulation of the content of radio broadcasting under the Communications Act.

Such consequences give rise to a serious question whether state regulation of programming, including advertising, in interstate broadcasting is an undue burden on interstate commerce, in violation of the commerce clause.[12] The power of the States to regu-

[12] The government's views concerning the general standards to be applied under the commerce clause are discussed in its brief as *amicus curiae* in *Colorado Anti-Discrimination Commission* v. *Continental Air Lines, Inc.*, Nos. 146 and 492, this Term, pp. 17–32.

late matters of local state concern and to adopt measures in some measure affecting interstate commerce does not extend, even in the absence of federal legislation, to state regulation which would "materially restrict the free flow of commerce across state lines, or interfere with it in matters with respect to which uniformity of regulation is of predominant national concern." *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 770. See also *Bibb* v. *Navajo Freight Lines*, 359 U.S. 520; *Morgan* v. *Virginia*, 328 U.S. 373, 377–379. Here, where Congress has legislated, the same factors surely demonstrate that regulatory activity by the States is preempted by the federal law.

B. THE STATE COURT'S INJUNCTION INTRUDES UPON THE FEDERAL SCHEME

In light of the considerations elaborated above, we submit that the state court's injunction cannot stand. A New Mexico statute made it a criminal offense to publish advertising which "by any means whatsoever [quotes] any prices or terms on eyeglasses, spectacles, lenses, frames or mountings, or which quotes discounts to be offered on eyeglasses, spectacles, lenses, frames or mountings or which quotes 'moderate prices,' 'low prices,' 'lowest prices,' 'guaranteed glasses,' 'satisfaction guaranteed,' or words of similar import." N. M. Stat. Ann. § 67–7–13. On the basis of this provision, the New Mexico court has enjoined the broadcasting of particular advertising material on the theory that it is contrary to the public interest as declared in state law. This, we contend, is a direct attempt to regulate a field preempted by the federal

government. If we are correct, it follows that the injunction is invalid under the supremacy clause of the Constitution. Article VI, clause 2.

We fully recognize, as this Court has held, that the States may exercise their police power to regulate optometry and other professions in the public interest, including the placement of advertising by members of such professions. *Williamson* v. *Lee Optical Co.*, 348 U.S. 483; *Semler* v. *Oregon State Board of Dental Examiners*, 294 U.S. 608. The fact that a prohibition forbidding optometrists to advertise, or to advertise in certain ways, might incidentally affect the advertising revenues of radio stations should not affect the validity of the state regulations. On the other hand, there is nothing in those cases dealing with the power of the States to regulate a radio station. The Oregon statute involved in the *Semler* case merely provided for revocation of the offending dentist's license; and the Oklahoma statute in *Williamson* restricted advertising by opticians only, and had a specific proviso to the effect that it did not render any newspaper or other advertising media liable for publishing any advertising furnished them by a vendor. 348 U.S. at 488, note 2.

Direct regulation of interstate broadcasting is a different matter. The New Mexico statute makes radio stations, in addition to optometrists, subject to criminal penalties and injunctions against advertising. The New Mexico courts issued an injunction against the station in this case. Thus, this case involves a direct assertion of state power to regulate the use of radio frequencies to prevent an advertisement by a Texas optometrist upon New Mexico's

determination that the broadcast of such advertising is contrary to the public interest. The fact that the state regulation goes only to particular kinds of advertising does not lessen the conflict with federal authority. While New Mexico sought to regulate the use of radio channels only in order to facilitate its primary and proper concern with the regulation of optometrists, "[c]ontrolling and therefore superseding federal power cannot be curtailed by the State even though the ground of intervention be different than that on which federal supremacy has been exercised." *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, 480; see *Napier* v. *Atlantic Coast Line R. Co.*, 272 U.S. 605.

The distinction between the regulation of optometrists and radio stations is of great practical significance. In this case, the optometrist was a resident of Texas, having no place of business in New Mexico, and was therefore not subject to the regulations of New Mexico. Even though the optometrist was not disobeying Texas law, New Mexico would not allow the radio station to broadcast his message to prospective customers in Texas and New Mexico. Situations in which the radio station is in a different State from the advertiser are common, since most radio broadcasting crosses state lines (see *supra*, pp. 24–26).

We also agree that the Communications Act does not broadly withdraw from the States the power to redress private wrongs. The fact that the radio portions of the Act have no remedial provisions for private persons is strong evidence that Congress intended no preemption in this area. Moreover, the

likelihood of conflict with any federal policy is remote. State law may therefore properly be applied, even though licensed facilities are involved, to adjudicate rights under a contract to purchase stock in a broadcasting station (*Regents* v. *Carroll*, 338 U.S. 586, 600, 602), a lease of the property utilized by a station (*Radio Station WOW* v. *Johnson*, 326 U.S. 120, 131–132), or a contract for exclusive personal services. Similarly, we believe that a State may make its ordinary remedies available to one defamed, albeit the offending publication was over the air waves, unless this would clearly conflict with federal policy. See *Farmers Union* v. *WDAY*, 360 U.S. 525.

Nor is it necessary to argue that a State may not enforce its traditional criminal laws when the offense is perpetrated by means of radio broadcasting. We assume, for example, that a State may be permitted to prosecute for fraud resulting from radio broadcasts. The legislative history of the 1952 amendment to the Communications Act, making it a federal crime to use broadcasting facilities to defraud (18 U.S.C. 1343), indicates that neither the original Communications Act nor the amendment was intended to displace state criminal jurisdiction; the amendment was apparently designed to cover the area of interstate crime where state authority may be insufficient. See H. Rep. No. 388, 82d Cong., 1st Sess., pp. 2–3. The absence of any comprehensive federal criminal code for radio broadcasting also strongly suggests that the States retain their ordinary criminal jurisdiction. Cf. *Pan American World Airways Inc.* v. *United*

States, Nos. 23 and 47, this Term, decided January 14, 1963.

The fact that Congress, in providing for the regulation of radio broadcasting, saw no need to write its own code to deal with traditional crimes covered by state law (*e.g.*, fraud) and traditional wrongs or torts for which the States uniformly provide a remedy (*e.g.*, defamation) does not lead to the conclusion that the States may apply the same sanctions as regulatory measures.[13] It is clear that the States have not been left free to develop their own divergent notions of what types of radio advertising and broadcasting are most likely to promote the public interest.

The line between (a) presumably permissible state enforcement of ordinary criminal and civil liability in a way that incidentally affects broadcasts and (b) the forbidden direct and substantial state regulation of interstate broadcasts no doubt depends more upon an appraisal of specific incidents than upon any single factor or rule of thumb. In most cases, the following considerations would seem most relevant.

(1) Does the state law express a judgment concerning the content of public communications, whether business communications or not, or is the circumstance that mass communications are involved more

[13] We emphasize, however, that we are not suggesting that the determinations of state courts awarding damages or imposing criminal penalties for traditional wrongs are never preempted. In particular situations, they may be precluded or modified to the extent necessary to reach a fair accommodation with the federal authority. See *Farmers Union* v. *WDAY*, 360 U.S. 525; *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 132.

or less involved irrelevant? If the former, as here, the application of the state law is the more likely to be preempted.

(2) There is a familiar line between traditional crimes (or torts) and those crimes (or wrongs) which are defined by so-called public welfare measures. As Professor Sayre has observed (*Public Welfare Offenses*, 33 Colum. L. Rev. 55, 67), there are "two pronounced movements which mark twentieth century criminal administration, *i.e.*, (1) the shift of emphasis from the protection of individual interests which marked nineteenth century criminal administration to the protection of public and social interests, and (2) the growing utilization of the criminal law machinery to enforce, not only the true crimes of the classic law, but also a new type of twentieth century regulatory measure involving no moral delinquency." Social and economic legislation is based on the various States particular views of the public interest and therefore creates a greater degree of risk of the very kind of interstate confusion which the federal regulation was designed to prevent.

(3) Does the State take hold of the conduct in advance or merely hold the broadcaster responsible for the content of his message? Obviously, the prior restraint creates a greater danger of interference with interstate programming.

(4) Is the State attempting to deal with matters exclusively of local concern or to reach beyond its borders in a way that affects citizens of other States and interstate commerce?

The practical differences resulting from these lines of analysis are best expressed in illustrations. If a radio disc jockey uses his broadcast time to issue signals or messages to persons engaged in a criminal conspiracy, no one would suggest that it interfered with the freedom of broadcasting or with the scheme of federal regulation for a State to indict him for crime. The same may be said of a broadcasting sponsor who fraudulently induces listeners to invest their money in Florida lots which are known to be valueless and to lie under three feet of water. Again, there is no interference with federal regulation if a State permits one of its citizens who has been defamed over the airwaves to sue the responsible parties for the slander.

Consider, by way of contrast, the following situations in which the application of State law would seem to interfere with the federal scheme. State "A" says that it does not regard the advertising of beer to be in the public interest and undertakes to prohibit it. May it forbid radio stations which operate within the State or which beam signals into the State from carrying such advertising? State "B" has a so-called "fair trade law." May it implement that law by forbidding or punishing radio advertising which announces that "fair-traded" commodities may be purchased in an adjoining State (which has no prohibition upon competitive pricing) at prices below the fair-traded figure? State "C" concludes that certain motion pictures which it classifies as not suitable for children may be shown in its motion picture

theaters to adults only. May it extend that regulation so as to forbid also the showing of these motion pictures by television broadcasters during daylight hours?

We do not urge that this Court need now decide a great variety of cases not currently before it. Our point is this: Congress' failure to deal with traditional crimes and wrongs accomplished by means of broadcasting may well permit the inference that it did not intend to create a vacuum and that the States may provide their traditional remedies; it is quite another matter to suggest that the States may apply regulatory measures which are either directed at radio broadcasting as such or which, even though they are of more general application, will cause direct and substantial interference with this interstate medium of communication because they will result in a wide diversity of rules and standards governing the matter of permissible program content.

Turning to the instant case, we note, at the outset, that the injunction here involved constitutes a direct regulation of broadcasting and a prior restraint upon it. Beyond this, it makes a determination of public interest which is at variance with the view of the public interest which is held by other States. Texas does not regard it as contrary to the public interest for optometrists to advise customers concerning the prices at which eyeglasses can be purchased. Yet New Mexico's law would inhibit the efforts of Texas optometrists to communicate with listeners—listeners

located in Texas as well as in New Mexico. It is undisputed, we take it, that the States may not undertake to license radio stations, to resolve problems of electrical interference between stations, to prohibit all advertising by radio stations, or to censor programming. *Allen B. Dumont Laboratories* v. *Carroll*, 184 F. 2d 153 (C.A. 3), certiorari denied, 340 U.S. 929; *RCA Communications* v. *Patchogue Broadcasting Co., Inc.* (19 Pike & Fischer, Radio Regulation 2071, N.Y. S.C., Suffolk County, March 25, 1960). Similarly, we submit, New Mexico may not determine what advertising is not in the public interest and may not be broadcast.

It may be contended that the Communications Act does not deal with the problem of professional advertising by radio or give the Commission power to prohibit the broadcasting of specific advertisements which it considers unethical. However, as we have noted above (pp. 5–6), once federal preemption is established, state law may not supplement the federal scheme any more than it may transgress it. *Campbell* v. *Hussey*, 368 U.S. 297, 302. Furthermore, such limitations as there are upon the power of the Communications Commission in the matter of regulating program content reflect a decision by Congress that administrative intervention should be limited, not a decision that fifty other sovereigns should be free to intervene. Cf. *Pennsylvania* v. *Nelson*, 350 U.S. 497, 504; *Allen B. Dumont Laboratories* v. *Carroll*, *supra*, 184 F. 2d at 156.

In addition, the federal Act does provide a remedy

for the interests asserted by New Mexico. Permian's license was renewed in 1959 and again in 1962, two years after the complaint below was filed. On each occasion, the Commission had before it the statutory issue whether the past and proposed broadcast operations of Permian, including its advertising, were in the public interest, and the Commission implicitly made the statutory determination—required by Sections 307(d), 308(a), and 309(a) of the Communications Act, 47 U.S.C. 307(d), 308(a), 309(a)—that Permian met this standard.

We have seen (pp. 16–17) that the Commission has in fact considered, in license renewal proceedings, whether a station's advertising is consistent with the public health and safety—which, presumably, are the objectives to which the New Mexico statute is addressed. Likewise, the Commission has considered whether a station has accepted advertising in violation of state law (see *supra*, pp. 17–18). The State of New Mexico could have filed a petition in the renewal proceeding, pursuant to Section 309(d)(1) of the Communications Act, 47 U.S.C. (Supp. II) 309(d)(1), to deny the renewal application on the ground that Permian's advertising violated state law and was contrary to the public interest. The State of Texas could also have intervened in any such proceeding to protect its interests. Section 309(e), 47 U.S.C (Supp. II) 309(e). If the Commission had agreed with New Mexico's position, it could have declined to renew

Permian's license unless the station ceased broadcasting the offending advertising. And if the Commission disagreed with New Mexico, the latter could have obtained review of any adverse Commission decision pursuant to Section 402(b) of the Communications Act, 47 U.S.C. 402(b), in the United States Court of Appeals for the District of Columbia Circuit.

The New Mexico injunction has the effect of bypassing the federal regulatory scheme altogether. "The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or an application of the federal Board, precludes state courts from doing so" and the "reasons for excluding state administrative bodies from assuming control of matters expressly placed within the competence of the federal Board also exclude state courts from like action." *Garner* v. *Teamsters Union*, 346 U.S. 485, 491. There is nothing here to suggest that the federal remedy was inadequate or that the activity enjoined so imminently threatened public safety as to call for extraordinary measures by the State.

CONCLUSION

For the foregoing reasons, we respectfully submit that judgment with regard to appellant Permian should be reversed.

ARCHIBALD COX,
Solicitor General.
LEE LOEVINGER,
Assistant Attorney General.
BRUCE J. TERRIS,
Assistant to the Solicitor General.
LIONEL KESTENBAUM,
MORTON M. MANEKER,
Attorneys.

MAX D. PAGLIN,
General Counsel,
DANIEL R. OHLBAUM,
Associate General Counsel,
RUTH V. REEL,
Attorney,
Federal Communications Commission.

FEBRUARY 1963.

U. S. GOVERNMENT PRINTING OFFICE: 1963